



U.S. Department of Justice

Antitrust Division

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BY ELECTRONIC FILING

Hon. Molly C. Dwyer, Clerk of Court
United States Court of Appeals for the Ninth Circuit
The James R. Browning Courthouse
95 7th Street
San Francisco, CA 94103

Re: *Teradata Corp. v. SAP SE*, No. 23-16065

The United States of America writes to advise the Court of *FTC v. Tapestry, Inc.*, No. 1:24-cv-03109-JLR, 2024 WL 4647809 (S.D.N.Y. Nov. 1, 2024), a recent decision addressing the use of non-price data in aggregate diversion ratio (ADR) analysis. *See* Fed. R. App. P. 28(j). As we explained in our amicus brief and at oral argument, ADR analysis is a well-accepted methodology for defining relevant markets in antitrust cases. *See* DOJ-FTC Amicus Br. 25-28. Contrary to the district court's suggestion, ADR analysis does not require actual pricing data—a variety of types of evidence, including certain non-price data, can be used to estimate the aggregate diversion ratio (or recapture rate).¹ *See id.* at 28-32.

Tapestry illustrates these points. There, the Federal Trade Commission's expert performed an ADR analysis using data from a survey that asked consumers what other brands they considered before purchasing a particular brand of handbag. *Tapestry*, 2024 WL 4647809, at *27. The court held that the Commission had properly defined a relevant market based this analysis. *Id.* at *34.

¹ The aggregate diversion ratio is the percentage of customers who leave a product because of a price increase who select another product in the proposed relevant market. *See* DOJ-FTC Amicus Br. 26-27.



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The court rejected the defendants' argument that the analysis was unreliable because "the survey questions do not directly ask what a consumer would do in the event of a price increase and therefore do not measure diversion." *Id.* at *30. The court explained that "[e]conomists regularly estimate diversion ratios using non-price-response data, and courts use such analyses to assess mergers." *Id.* at *31. The court stated that "the questions relied on by [the FTC's expert] are sufficiently indicative of diversion because they elicited the consumer's next best option." *Id.* at *30. The court summarized that even if ideal data "is unavailable or difficult to obtain, as long as available data are sufficient for a reasonable judgment on the market issue, defendants should not prevail simply on a claim that other data might indicate a different and more favorable result." *Id.* at *33 (cleaned up).

Respectfully submitted.

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cc: All Counsel of Record (by ECF notice)